SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

NO. 73-799

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

JOHN A. BAILEY
Suite 2255, 22nd Floor
Control Data Building
2000 West Loop South
Houston, Texas 77027

BENJAMIN W. YANCEY
Terriberry, Carroll, Yancey
& Farrell
2141 International Trade Mart
2 Canal Street
New Orleans, Louisiana 70130

G. ALLEN KIMBALL
WILLIAM M. NOLEN
Jones, Kimball, Patin, Harper,
Tete & Wetherill
Post Office Box 910
Lake Charles, Louisiana 70601
Attorneys for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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REPLY BRIEF OF PETITIONERS

In its memorandum in opposition to petitioners' application for certiorari, the government ignores that which it cannot deny, i.e., (1) that it has judicially admitted that *Bay Sound* "is on all fours with the facts in *Tidewater*" and that Bay Sound is more entitled to the surtax exemptions at issue than was Tidewater, (2) that it eventually acquiesced in the granting of the exemptions to Tidewater

and (3) that it continues its efforts to deny the exemptions to Bay Sound to this day. Its admissions in *Tidewater* make immaterial the government's statement that "the ultimate question in every Section 269 case is the factual one," and its reference to the similarities between the two cases as "alleged" utterly out of place. (Mem. 4).

Petitioners' position that the rationale of the *Sirbo Holdings* case clearly requires a reversal *Bay Sound* is in no way answered by the five-sentence paragraph devoted to that case in the government's memorandum, three of those sentences being no more than bald statements that the case is "distinguishable." (Mem. 4). The government initially contested the rights of both Sirbo Holdings and Boston Fish Market to capital gains treatment just as it initially contested the rights of both Bay Sound and Tidewater to surtax exemptions. The government tacitly abandoned its contest of capital gains treatment in *Boston Fish Market* by failing to brief that issue in the Tax Court[1] but continued to contest capital gains treatment in *Sirbo Holdings*. The government actively abandoned its con-

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1. This is shown by the following excerpt from *Sirbo Holdings, Inc. v. Commissioner*, 476 F.2d 981 at 987: "Two months after the [Tax Court] decision [in Sirbo Holdings], Judge Raum of the Tax Court accorded capital gains treatment to a payment almost identical in nature. *Boston Fish Market Corp.*, 57 T.C. 884 (March 29, 1972) . . . The government . . . seeks to explain the disparate results on the ground that the taxpayer's contention in *Boston Fish Market* was that the lessee's payment was not income at all . . . and, once that point was decided against the taxpayer, the Commissioner abandoned his challenge to the propriety of capital gains treatment, see 57 T.C. at 887 n. 2."

The reference to the Tax Court opinion in *Boston Fish Market* is the following: "On brief the Commissioner no longer argues that the $47,500 is taxable in full as ordinary income." 57 T.C. at 887 n. 2.

test of surtax exemptions for Tidewater by entering into and filing a joint stipulation of dismissal of its appeal[2] from the unfavorable decision of the district court but continued to contest Bay Sound's right to the exemptions on its appeal. *Sirbo Holdings* was reversed because of the apparent similarity between its facts and *Boston Fish Market* and thus the government's apparent inconsistency in the two cases. *Bay Sound* must be reversed because of its admitted indistinguishability from *Tidewater* and thus the government's undeniable inconsistency in the two cases.

At two points in its memorandum, the government contends that discrimination against Bay Sound and in favor of Tidewater is negatived by the fact that the government initially contested the right of the taxpayer to the exemption in each case. (Mem. 4 and 5). *Sirbo Holdings* shows that initial equality of treatment does not pardon subsequent discrimination by abandonment of the contest in one case and contrary persistence in the other. Such initial equality of treatment obviously cannot excuse the government's subsequent discrimination

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2. The order dismissing the appeal in *Tidewater* reads as follows:

"The parties hereto having filed a joint stipulation of dismissal of appeal, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, effective July 1, 1968, and it appearing that the record has not been docketed in the United States Court of Appeals for the Fifth Circuit;

"IT IS ORDERED that the appeal taken by the defendant is hereby dismissed.

"Dated at New Orleans, Louisiana, this 2nd day of October, 1968.

"/s/ FRED J. CASSIBRY

United States District Judge"

against Bay Sound in view of its admissions in *Tidewater*. This is a clear-cut case of overt discrimination. As such, it is an ideal vehicle for this Honorable Court to affirm the government's duty to treat identically situated taxpayers equally, a duty recognized by two of the Circuits but ignored by the Fifth Circuit in this case.

Respectfully submitted,

JOHN A. BAILEY
Suite 2255, 22nd Floor
Control Data Building
2000 West Loop South
Houston, Texas 77027

BENJAMIN W. YANCEY
TERRIBERRY, CARROLL, YANCEY
& FARRELL
2141 International Trade Mart
2 Canal Street
New Orleans, Louisiana 70130

G. ALLEN KIMBALL
WILLIAM M. NOLEN
JONES, KIMBALL, PATIN, HARPER,
TETE & WETHERILL
Post Office Box 910
Lake Charles, Louisiana 70601

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief have been served on the United States by air mailing, with postage prepaid, on this the _____ day of _____, 1974, the same to the following:

(1) Robert H. Bork, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

(2) Meyer Rothwacks, Esquire
Chief, Appellate Section
Tax Division
Department of Justice
Washington, D. C. 20530

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JOHN A. BAILEY